APPENDIX 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action C77-1767A Civil Action C79-1508A

ORDER

These consolidated cases are before the Court on defendants' motion for summary judgment. Defendants contend that the final judgment of dismissal in Donald H. Stephens v. Housing Appeals Board of the City of Atlanta, et al., Civil Action No. C-40561 (Superior Court of Fulton County; final judgment entered July 9, 1980),[1] acts as a bar to this litigation because of the doctrine of res judicata.

According to Professor Moore,

> A final, valid determination on the merits is conclusive on the parties and those in privity with them as to the matters adjudged, or which should have been litigated, in another action or proceeding involving the same cause of action.

1B Moore's Federal Practice, 0.405[3], pages 631-32.

A. Final determination on the merits

There is no question but that there has been a final, valid determination on the merits in the state court. On July 17, 1979, Judge McKenzie of the Superior Court of Fulton County dismissed C-40561 for want of prosecution. Plaintiff Stephens appealed that order of dismissal to the Court of Appeals of Georgia. The Court of Appeals affirmed the order of dismissal on January 18, 1980. The affirmance was made the final judgment of the state court by order of Judge McKenzie dated July 9, 1980. Under Georgia law, a dismissal for want of prosecution is an adjudication upon the merits. Ga. Code. Ann. 81A-141(b).

B. The Parties

Mr. Donald H. Stephens is the plaintiff in these consolidated cases and was the plaintiff in the state court action. The defendants in the state court action were the Housing Appeals Board and five listed members of the Board in their official capacities (four were later deleted); Assistant City Attorney J. M. Harris; and City Attorney Ferrin Y. Mathews. Plaintiff "vouched in" B. L. Lowery, Mr. James Smith, and J. K. Harper. In these two consolidated actions, the defendants are the Housing Appeals Board and seven listed members, both individual and official capacities; Assistant City Attorney J. M. Harris; City Attorney Ferrin Y. Mathews; the City of Atlanta; B. L. Lowery individually and as Chief Housing Code Inspector of the City of Atlanta; Mr. James A. Smith, individually and as Chief Housing Code Inspector of the City of Atlanta; and J. K. Harper, individually and as Area Inspector of the City of Atlanta. The only significant difference between the parties involved in the state court action and the parties in the consolidated federal cases is that the City itself is a defendant in the federal cases. Thus there is the substantial identity of parties required to invoke the doctrine. See generally 1b Moore's Federal Practice 0.411[1]; see also 0.405[9] (vouching in).

C. Cause of Action

Black's Law Dictionary (5th ed. 1979) defines a cause of action as "[t]he fact or facts which give a person a right to judicial relief. . . . A situation or state of facts which would entitle [a] party to sustain [an] action and give him the right to seek a judicial remedy in his behalf." The definition of 'cause of action' has proved difficult, however, in applying res judicata. Among the various tests which have developed are

> whether the same right is infringed by the same wrong; whether 'there is a measure of identity that a different judgment in the second action would destroy or impair the rights or interests established by the first judgment; identity of grounds; whether the same evidence would suffice to sustain both judgments.

1B Moore's Federal Practice, 0.410[1], page 1158 (citations omitted).

A careful comparison of the amended complaint in the state court action with those in these consolidated cases reveals that, what ever test is applied, the cause of action is essentially the same, the deeds of defendants of which plaintiff complains are essentially the same in the state and federal cases; the 'placarding' of his residence and irregularities in the hearing afforded plaintiff by the Atlanta Housing Appeals Board. The cast of plaintiff's state court complaint is oriented toward state law, and in that case plaintiff prayed for the court to set aside the Board's decision and to insure a fair hearing in compliance with due process. In the federal complaints, plaintiff casts his language in terms of the same acts of defendants being in violation of his federal procedural and substantive rights. He asked this Court to declare the placard to be illegal and also sought money damages. Plaintiff's demands vary slightly; the facts complained of are the same; the only noteworthy difference in the cases is the different legal theories pursued. Res judicata, however, acts as a bar not only as to the theories asserted in the state court action but as to every legal theory that might have been asserted. "This applicaton of the doctrine of res judicata operates 'to prevent the splitting of a single cause of action and the use of several grounds for recovery under the same action as the basis for separate suits.'" 1B Moore's Federal Practice 0.410[2], pages 1162-64. Since the cause of action is the same in these cases as in C-40561, in which judgment was rendered against plaintiff and in favor of defendants, res judicata bars this litigation. Defendants' motion for summary judgment is GRANTED. The trial set for December 15, 1980 is unnecessary and judgment shall be entered for defendants.

IT IS SO ORDERED, this 8 day of December, 1980.

[signature]

Marvin H. Shoob, Judge
United States District Court
Northern District of Georgia

APPENDIX 2

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 80-9061

Summary Calender

Donald H. Stephens
Plaintiff-Appellant,
v.
B. L. Lowery, James A. Smith
and J. K. Harper, et al.,
Defendants,-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

(September 10, 1981)

Before HILL, FAY, and ANDERSON, Circuit Judges.
PER CURIAM:

The order of Judge Shoob, United States District Court, Northern District of Georgia, dated December 5, 1098, granting the defendant's motion for summary judgment is affirmed.

AFFIRMED.

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*
UNIT B

NO. 80-9061

Donald H. Stephens,
Plaintiff-appellant,
versus
B. L. Lowery, James A. Smith and J. K. Harper, et al.,
Defendants-appellees.
Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC
(Opinion September 10, 1981)

Before HILL, FAY AND ANDERSON, Circuit Judges
PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this administrative Unit in regular active service having requested that the Court be polled on rehearing en blanc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for rehearing En Blanc is DENIED.

( ) The petition • • •

ENTERED FOR THE COURT:
[SIGNATURE] James C. Hill
United States Circuit Judge

*Former Fifth Circuit Case; (Section 9(1) of Public Law 96-452-October 14, 1981)